No. 92-1639

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THE CITY OF CHICAGO, et al.,
Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, INC., et al.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit**

BRIEF FOR THE CITY OF SPOKANE, WASHINGTON; SPOKANE COUNTY, WASHINGTON; SKAGIT COUNTY, WASHINGTON; CITY OF TACOMA, WASHINGTON; MARION COUNTY, OREGON; RECOMP OF WASHINGTON; AND REGIONAL DISPOSAL COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici are local governments and private companies in the Pacific Northwest that share an interest in protecting public health through cost-effective waste management. *Amici* urge the Court to reverse the judgment of the court of appeals and to hold that 42 U.S.C. § 6921(i), which excludes resource recovery facilities burning municipal solid waste

from hazardous waste regulation, encompasses the ash residues of that waste.[1]

As *amici* know from their own experience, local governments face major challenges in seeking to dispose of municipal trash. Resource recovery is a key weapon in the war on waste.

Amici City and County of Spokane adopted resource recovery in the 1980s to address shrinking landfill capacity and threats to the drinking water supply caused by pollution from existing landfills. *Amici* Skagit County, Marion County, and Tacoma, like Spokane, chose recycling and resource recovery as cost-effective waste disposal measures in the best interests of their local communities. Whatcom County, Washington, elected to use the private incineration and ash landfill facilities of *amicus* Recomp of Washington. *Amicus* Regional Disposal owns and operates a state-of-the-art ash monofill in Klickitat County, Washington. This monofill, constructed to the exacting standards of the Washington Incinerator Ash Residue Act, Wash. Rev. Code ch. 70.138 (1992), serves Spokane and could become an ash disposal site for other resource recovery facilities in the Pacific Northwest.

STATEMENT

The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901 - 6992k, establishes a comprehensive national framework for waste management. RCRA sets forth minimum federal requirements to be implemented at the state and local level. State and local

[1] The parties' letters of consent have been filed with the Clerk, pursuant to Rule 37.3 of the Rules of this Court.

governments may supplement RCRA's minimum requirements with more stringent standards.

At the heart of RCRA is a distinction between wastes that are regarded as "hazardous" and wastes that are not. *See* 42 U.S.C. § 6921. "Hazardous" wastes are a small subset of "solid" wastes. Hazardous wastes are subject to stringent standards under Subtitle C of RCRA, 42 U.S.C. §§ 6921 - 6939b. Subtitle C standards detail all phases of hazardous waste management, from the type-size on 55-gallon drum labels to the design standards for large regional landfills. Solid wastes are subject to an equally comprehensive but less stringent set of minimum standards under Subtitle D of RCRA, 42 U.S.C. §§ 6941 - 6949a.

Congress's decision to regulate hazardous wastes and solid wastes separately rests on the sound judgment that hazardous wastes pose the greatest risk to public health and should be regulated more stringently than other wastes. At the same time, Congress recognized that applying Subtitle C standards too broadly could discourage beneficial activities; moreover, effective implementation of Subtitle C requires focusing on those that generate the largest amounts of hazardous waste. Congress therefore authorized exclusions to its definition of hazardous waste. The Environmental Protection Agency ("EPA") was given the authority to identify and to regulate the wastes subject to Subtitle C. *See* 42 U.S.C. §§ 6921 - 6924. The states were given primary responsibility for regulating the remaining waste stream.

In 1980 the EPA issued regulations identifying certain solid wastes as hazardous. *See* 45 Fed. Reg. 33,119 (May 19, 1980). The EPA *excluded* from Subtitle C regulation certain other solid wastes that might otherwise be regarded as hazardous. *See id.* at 33,096 - 97. Among these were "household wastes." *See id.* at 33,120, *codified as* 40 C.F.R.

§ 261.4(b)(1) (1992). Four years later, as part of the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984) (the "1984 Amendments"), Congress added to RCRA a new Section 3001(i), entitled "Clarification of household waste exclusion." The current dispute addresses the scope and meaning of Section 3001(i).

Section 3001(i) provides:

> A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter if--
>
> (1) such facility--
>
> (A) receives and burns only--
>
> (i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
>
> (ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
>
> (B) does not accept hazardous wastes identified or listed under this section, and

> (2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. § 6921(i).

The EPA has never regulated ash from municipal resource recovery facilities as a hazardous waste. The EPA's "household waste" exclusion expressly encompassed the ash residues remaining after incineration. 45 Fed. Reg. 33,099 (May 19, 1980). In 1985 the EPA stated that, while it did not understand Section 3001(i) to cover ash residues that routinely displayed a hazardous characteristic, it had no reason to believe that such residues were hazardous under existing rules, and it did not plan to subject resource recovery facilities to additional regulatory burdens. 50 Fed. Reg. 28, 725-26 (July 15, 1985). Congress expressly forbade the EPA from regulating ash from incineration units burning municipal waste for a period of two years after enactment of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2584 (1990). Finally, the EPA determined last September that it was unnecessary and inappropriate to regulate ash under Subtitle C. Exemption for Municipal Waste Combustion Ash from Hazardous Waste Regulation Under RCRA Section 3001(i) (Memorandum of William K. Reilly, Administrator of the EPA, to all regional administrators dated Sept. 18, 1992) ("EPA's 1992 Memorandum").

In the meantime, however, litigation arose challenging the application of Section 3001(i) to ash residues. The plaintiffs in two cases established that incinerator ash frequently fails laboratory tests of toxicity. *See*

Environmental Defense Fund v. Wheelabrator Technologies, 725 F. Supp. 758, 761 n.6 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S.Ct. 453 (1991) (nine out of ten samples of ash from the Westchester Resource Recovery Facility failed EP toxicity test); *Environmental Defense Fund v. City of Chicago*, 948 F.2d 345, 346 (7th Cir. 1991), *vacated*, 113 S. Ct. 486 (1992), *aff'd on remand*, 985 F.2d 303, *cert. granted*, 61 U.S.L.W. 3845 (1993) (32 out of 35 samples of ash from the Northwest Waste-to-Energy Facility exceeded the standard for Extraction Procedure toxicity).

The United States Court of Appeals for the Second Circuit concluded that incinerator ash was excluded from regulation as a hazardous waste under Section 3001(i). *Wheelabrator*, 931 F.2d at 213. The Seventh Circuit, over the dissent of Judge Ripple, held that it was not. *Chicago*, 948 F.2d at 352. This Court granted certiorari, vacated the decision, and remanded for reconsideration in light of the EPA's 1992 Memorandum. 113 S. Ct. 486 (1992). On remand, the court of appeals affirmed its previous decision, with Judge Ripple again dissenting. 985 F.2d 303 (7th Cir. 1993). This Court granted the City's petition for certiorari.

SUMMARY OF ARGUMENT

Section 3001(i) does not directly address incinerator ash. The courts have divided on whether "treating," "disposing of," and "otherwise managing" hazardous wastes encompass disposal of treatment residues (ash), or whether those residues should rather be considered to be "generated" in the process of incineration. Where, as here, congressional silence has left a gap in the statute, courts should defer to the reasonable interpretation of the agency charged with enforcing the law. Both the context in which Congress acted and the goals it sought to achieve strongly favor placing ash

within the statutory exclusion. The interpretation set forth in the EPA's 1992 Memorandum is plainly permissible.

Deference to the EPA's interpretation is especially appropriate in light of the complexity of RCRA and the many policies that underlie it. The Seventh Circuit ignored these considerations and, instead, focused on the alleged hazards of ash. The court's factual assumptions are simply wrong: in a landfill environment, ash is safer than untreated municipal solid waste. The EPA's policy analysis supports excluding incinerator ash from Subtitle C regulation.

The EPA's position is well-considered and consistent with both its initial understanding of the household waste exclusion and regulatory practice over the past 13 years. Disregarding that history and adopting the Seventh Circuit's approach would upset the long-term plans and contracts of local governments that accepted Congress's invitation to invest in resource recovery facilities. Such a draconian result is neither necessary nor appropriate.

ARGUMENT

A. The Court of Appeals Erred in Refusing to Defer to the EPA's Interpretation.

As the court of appeals acknowledged, each party to this litigation argues that the plain language of Section 3001(i) supports its position. 948 F.2d at 348. The court described Section 3001(i) as "a statute subject to varying interpretations." *Id.* at 350. Nevertheless, the court declined to rely on the interpretation advanced by the EPA, the agency charged with enforcing RCRA, because it regarded that interpretation as "waffling" and "see-sawing." *Id.* The court also declined to rely on legislative history. Thus cast back on the language of the statute, the court sought to divine

Congress's intent from the words Congress used. After examining several statutory definitions, the court concluded that keeping ash outside the scope of Section 3001(i) was consistent with policy judgments that it assumed underlay RCRA. *See id.* at 352.

Amici will show that the court of appeals' policy analysis rests on factual assumptions that are demonstrably false. Unlike administrative agencies, courts are singularly ill-equipped to make such judgments. In its decision following this Court's remand, however, the court of appeals refused to credit the EPA's 1992 Memorandum. Asserting that "the language of Section 3001(i) is clear," 985 F.2d at 304, the court ruled that the Administrator's policy arguments can only be advanced to Congress. In so ruling, the court not only disregarded this Court's mandate to follow *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), but also gave unwitting testimony to the soundness of *Chevron*'s precepts.

1. The statute is silent with respect to the specific issue of ash residues.

In reviewing an agency's construction of the statute that it administers, a court first asks "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, "the unambiguously expressed intent of Congress" must be given effect. *Id.* at 843. If, on the other hand, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

Section 3001(i) does not directly address the status of incinerator ash. The parties here and two courts of appeal dispute the inferences that should be drawn from this silence, as well as the scope and meaning of the terms used in the

statute. In such a case, *Chevron* demands deference to the agency's reasonable construction.

Section 3001(i) must be examined in context. Congress enacted its "Clarification of household waste exclusion" in 1984 mindful of the scope of that exclusion. Without question, the EPA's then-current regulatory exclusion encompassed incinerator ash. The EPA observed in its 1980 preamble to the regulation creating the exclusion that Congress, in passing RCRA, intended to exclude ***the entire household waste stream*** from regulation under Subtitle C. In the EPA's view, this waste stream included ash residue produced in the incineration of household waste:

> Since household waste is excluded in all phases of its management, residues remaining after treatment (e.g. incineration, thermal treatment) are not subject to regulation as hazardous waste.

45 Fed. Reg. 33,099 (May 19, 1980).

Had Congress meant to change this aspect of the regulatory exclusion, it would have said so. After all, the 1984 Amendments did clearly extend the exclusion from household wastes to municipal wastes generally, including non-hazardous commercial and industrial wastes, subject to adoption of procedures to guard against receipt or burning of hazardous materials. Yet "[n]owhere in the 1984 exclusion, nor in the Committee report that accompanied it, is there any hint of a congressional intent to limit the scope of that earlier exclusion." *Wheelabrator*, 725 F. Supp. at 765. What this Court noted in *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986), is equally true here: "'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by

Congress.'" *Id.* at 983 (quoting *NLRB v. Bell Aerospace, Co.*, 416 U.S. 267, 275 (1974)).

It cannot be credibly argued that ash remains excluded from Subtitle C regulation pursuant to the EPA's 1980 exclusion so long as it results from the incineration of household wastes, but not if it is the product of burning other municipal wastes. *See Wheelabrator*, 725 F. Supp. at 765. Such an interpretation would make a hash of the 1984 Amendments. Moreover, it would run counter to the express will of Congress to extend the scope of the exclusion beyond household waste. *See id.* The most that can be said in favor of respondents' position is that congressional silence regarding ash left a gap for the EPA to fill.

According to the court of appeals, the absence of the term "generating" in a list of hazardous waste-related activities in Section 3001(i) is critical: it limits the scope of the exclusion. *See* 948 F.2d at 351.[2] Congress may well have determined, however, that the terms it used were sufficient, if not better suited, to carry forward the existing exclusion of incinerator ash.

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[2] The Report of the Senate Committee on Environment and Public Works that accompanied Section 3001(i) states:

> All waste management activities of [a resource recovery] facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations . . . are met.

S. Rep. No. 284, 98th Cong., 1st Sess. 61 (1983). There is no indication that Congress meant to narrow the waste management activities covered by the statutory exclusion. *See Wheelabrator*, 725 F. Supp. at 764-65.

The specific terms used in Section 3001(i)--"treating," "storing," "disposing of"--all appear in the original household waste exclusion:

> The following solid wastes are not hazardous wastes:
>
> (1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused.

45 Fed. Reg. 33,120 (May 19, 1980), *codified as* 40 C.F.R. § 261.4(b)(1) (1992). If the EPA did not see any need to use the term "generation" for ash to be included in the scope of its regulatory exclusion, it is doubtful that Congress would have thought the term necessary for its statutory clarification to have the same effect.

Nor should Congress have anticipated such an interpretation. Section 3001(i) provides that a qualifying resource recovery facility shall not be deemed to be "treating, storing, disposing of or otherwise managing hazardous wastes for the purposes of regulation under [Subtitle C]." "Treatment" includes any process designed to change the physical, chemical, or biological character of hazardous waste so as to reduce its volume. 42 U.S.C. § 6903(34). Incineration is such a process.[3]

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[3] The court of appeals noted that ash "is fundamentally different in its chemical and physical composition from the . . . rubbish that goes in." 948 F.2d at 351. The court of appeals, however, drew the wrong inference from this observation: that ash was a "whole new substance," subject to a different form of regulation.

As Congress knew in 1984, the regulatory exclusion defined ash as the "residues remaining after treatment." *See* 45 Fed. Reg. 33,099 (May 19, 1980). Section 3001(i)'s specification of "treatment" reasonably includes "treatment residues." Congress also expressly addressed disposal, and ash is what a resource recovery center must dispose of. Like the EPA before it, Congress was excluding an entire waste stream, from collection to treatment to disposal of the treatment residue, from regulation under Subtitle C.[4] The notion that a "new" waste would be "generated" in the middle of this process, requiring a separate exclusion for "generation," is foreign to Congress's approach.

Section 3001(i) also speaks broadly of "otherwise managing" hazardous waste. The statute does not define "otherwise managing." The court of appeals decided, however, that "otherwise managing" should be interpreted as congruent with "hazardous waste management," which as defined in 42 U.S.C. § 6903(7) does not include "generation." The court ignored the fact that Subtitle C is captioned "HAZARDOUS WASTE MANAGEMENT" and includes standards for the generation of waste. 42 U.S.C. § 6922. That Congress would focus on the niceties of definitional

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[4] The Senate Report observes:

> Resource recovery facilities often take in . . . "household wastes" mixed with other non-hazardous waste streams from a variety of sources other than "households." New section 3001(i) clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

S. Rep. No. 98-284, 98th Cong., 1st Sess. 61 (1983).

language rather than statutory headings, and use fine gaps in the former to mark a significant departure in regulatory policy, is highly doubtful.

The other provisions of Section 3001(i) are also inconsistent with the court of appeals' interpretation. The exclusion for resource recovery facilities contained in Section 3001(i) is conditioned on adequate assurances that the facility will not accept hazardous wastes. *See* 42 U.S.C. § 6921(i)(2). Such requirements are obviously intended to improve the quality of the treatment residue, i.e., the ash. If ash were not the focus of this exclusion, one would expect to find similarly qualified exclusions for other solid waste facilities (e.g., landfills). There are no such qualifications elsewhere in the statute.

Beyond inconsistency, the court of appeals' interpretation leads to absurdity. Under the court's reading, Section 3001(i) provides only that a facility that does not accept hazardous wastes will not be deemed to be handling such wastes. This is wholly redundant. As the district court observed in *Wheelabrator*, under this construction "it is difficult to understand what, if any, benefit the [f]acility derives from the exemption." 725 F. Supp. at 763 n.12.

Statutes should be construed in context. They should be construed to avoid absurdity. The court of appeals' interpretation of Section 3001(i) violates both canons of construction. The most that can be said for respondents' arguments is that Congress left a gap in the statute. Refusing to credit the EPA's reasonable interpretation in these circumstances is error.

2. The EPA's interpretation comports with the policies underlying RCRA.

Deference to administrative agencies is especially appropriate in an area that is complex and highly technical and involves significant policy issues. *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991). As this Court has explained:

> Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches. As *Chevron* itself illustrated, the resolution of ambiguity in a statutory text is more often a question of policy than of law.

Id. at 2534. The court of appeals in this case, however, esteemed its own policy judgments superior to those of the EPA.

According to the court of appeals, to include incinerator ash within Section 3001(i) would be an "absurd" reading of the statute:

> It is unlikely that Congress, in an express effort to promote the proper disposal of dangerous substances that otherwise would seep into the ground and water table, would sanction the dumping of massive amounts of hazardous waste in the form of ash into ordinary landfills.

948 F.2d at 352. Just as alarmist rhetoric is no substitute for analysis, so the court's assertions regarding likely congressional intent do not withstand scrutiny.

Ash tests positive for toxics for the simple reason that incineration, by reducing the volume of municipal waste, concentrates the heavy metals that are already in that waste. These metals are *more* likely to seep into the ground and water table if untreated solid waste (in much more "massive" quantities) is placed in ordinary landfills. As combustion liberates energy from the waste, moreover, it destroys bacteria, viruses, and volatile organic compounds. Consequently, ash is easier to handle and safer in a landfill environment than the municipal solid waste ("MSW") that it replaces.

Research supports these conclusions. Samples of MSW combustion ash have been tested according to the Extraction Procedure and the Toxicity Characteristic Leaching Procedure ("TCLP"). These procedures simulate landfill conditions by passing liquids through a waste sample and measuring the constituents that leach into the liquid.[5] In the laboratory, ash may be "hazardous" due to levels of heavy metals, typically lead and cadmium, in the extraction liquids. *See* H. Sale, *Trash, Ash, and Interpretation of RCRA*, 17 Harv. Env. L. Rev. 409, 421 (1993); R. Goodwin, *Defending the Character of Ash*, 6 Solid Waste and Power 18, 18 (1992).[6]

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[5] The Extraction Procedure, referred to by the court of appeals (948 F.2d at 346), is the TCLP test's predecessor. The TCLP uses one of two leaching fluids, depending on the results of a pre-test of the ash. Alyce M. Ujihara and Michael Gough, *Managing Ash from Municipal Waste Incinerators* 20 (1989); 40 C.F.R. Pt. 261 App. II (1992).

[6] Respondents have argued that improved waste screening and more recycling might enable resource recovery facilities to ensure that their ash passes the TCLP. Respondent's Brief in Support of Certiorari, at 11 n.7 (June 1, 1993). By its terms, however, Section 3001(i) already conditions the exemption on use of contractual restrictions and inspection procedures to screen out materials that would impair ash quality. In suggesting further

Unless one knows how untreated MSW would fare under the same test, one cannot say anything about the relative hazards of ash. In the real world, studies show, leachate from landfills containing only ash is consistently less contaminated than leachate from landfills containing unburned household wastes. *See* 1 NUS Corporation, *Characterization of Municipal Waste Combustion Ashes and Leachates from MSW Landfills, Monofills and Co-Disposal Sites* ES-10 (1987) (EPA/530-SW-87-028A). The incineration process diminishes household wastes' toxicity by destroying the volatile organics that can otherwise leach from the wastes. *Id.* at 2-19.

Moreover, ash tends to solidify in landfills, rendering immobile the heavy metal constituents that often cause it to be categorized as "hazardous" in laboratory tests. Goodwin at 20. Air pollution control equipment in resource recovery facilities typically sprays lime reagents into combustion exhaust to reduce acid gasses. These lime reagents mix with the combustion ash and induce it to "set up into a pozzolanic (concrete-like) product." *Id.* at 18. *See* Sale at 424. Consequently, the laboratory simulation data relied upon by the court of appeals predict "much higher leaching of heavy metals than actually occur[s]." Goodwin at 20. *See* Sale at 423. So stable is the ash residue from resource recovery facilities that the concentration of metals in its leachate is below EPA's maximum allowances for drinking water. Goodwin at 20, Table 2. Over time, moreover, many of the metals pass below the threshold of detectability. *See id.* at 20-22 and Table 3. Because unburned waste undergoes no such stabilization, the heavy metals found in untreated MSW,

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screening requirements, respondents demonstrate the inconsistency between their interpretation and congressional intent.

though less concentrated, are more likely to leach into the environment.

Not only is the court of appeals' analysis of relative safety critically ill-informed; in addition, the court fails to address a number of policies other than safety that Congress carefully balanced in the 1984 Amendments and in RCRA. Review of these policies shows that exclusion of ash from Subtitle C advances the same policy goals as exclusion of unburned municipal wastes, and others as well.

Supporting the exclusion of municipal trash from Subtitle C are a number of RCRA policy considerations: the regulations available under Subtitle D;[7] the cost of complying with Subtitle C;[8] and the large volume of waste involved, which would overwhelm EPA's Subtitle C program.[9] The same factors support excluding ash. Ash is subject to RCRA Subtitle D regulation. *See* 56 Fed. Reg. 51,040 (Oct. 9, 1991); EPA's 1992 Memorandum, at 5.[10] The cost of

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[7] *See* 45 Fed. Reg. 33,099 (May 19, 1980) (noting that exempted household waste stream would be subject to Subtitle D).

[8] The EPA found that, on a national basis, there is over a tenfold difference between the per-ton cost of disposing of materials in Subtitle C facilities than in a Subtitle D landfill. EPA's 1992 Memorandum, at 7.

[9] *Cf.* 45 Fed. Reg. 33,104 (May 19, 1980) (exempting from Subtitle C hazardous wastes produced in small monthly quantities, because including such wastes would overrun the Subtitle C program).

[10] Effective October 9, 1993, EPA's Subtitle D program requires as a nationwide minimum that landfills be lined, their leachate collected, and both systems double-checked through ground water monitoring. *See* 40 C.F.R. Pt. 258 (1992). Even if leaching of ash occurs, therefore, the leachate will not enter the ground water so long as the liner and collection system are functioning.

disposing of ash at Subtitle C facilities could be "enormous." *Id.* at 7. Given the relative safety of ash residues, filling Subtitle C facilities with massive quantities of ash would be a gross misuse of resources.[11]

Excluding ash from hazardous waste regulation also furthers Congress's policy of encouraging resource recovery. *See* 42 U.S.C. § 6902(a) ("The objectives of this chapter are to . . . conserve valuable material and energy resources").[12] *See also* 42 U.S.C. § 6902(a)(1) (federal assistance for planning resource recovery); § 6942(c)(10) and (11) (state plans must consider resource recovery facilities and markets

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[11] As one commentator states:

> At the end of 1987, EPA estimated that the entire U.S. hazardous waste capacity was 34 million tons. Yet, waste combustion facilities in the U.S. generate from 7 to 9 million tons of ash per year. New hazardous waste disposal space is politically difficult to site and expensive to build.

H. Sale, 17 Harv. Env. L. Rev. at 432 (footnotes omitted).

[12] The Congress finds with respect to energy, that--

> (1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;
>
> (2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation;
>
> (3) technology exists to produce usable energy from solid waste.

42 U.S.C. § 6901(d).

for energy recovery); § 6943(c) (federal assistance for studying feasibility of resource recovery systems).

Finally, excluding ash from Subtitle C promotes reduction of solid waste volume, since resource recovery reduces the bulk of the material that must be placed in a landfill. 42 U.S.C. § 6941a(3). *See* 42 U.S.C. § 6901(b)(8) (calling for alternative land disposal practices to conserve solid waste disposal site capacity); 42 U.S.C. § 6903(34) ("treatment" includes volume reduction).

In short, the rationale that the court of appeals imputed to Congress--distinguishing between "hazardous" ash and "safe" household waste--collapses in the light of real-world experience. Ash poses *less* risk to the environment than other forms of the household waste stream that are excluded from regulation under Subtitle C. Ash is the necessary concomitant of energy recovery and volume reduction, two policies that RCRA expressly encourages. What this Court observed in a case last term is equally true here:

> We should be especially reluctant to reject the agency's current view, which . . . so closely fits "the design of the statute as a whole and . . . its object and policy."

Good Samaritan Hospital v. Shalala, 113 S. Ct. 2151, 2161 (1993) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)). The Court should defer to the EPA's interpretation of Section 3001(i) as excluding ash residues from Subtitle C.

B. The Court of Appeals' Criticism of the EPA is Misplaced.

According to the court of appeals, "the EPA has changed its view so often that it is no longer entitled to the deference normally accorded an agency's interpretation of the statute it administers." 985 F.2d at 304. The court mistakes agency caution for vacillation. Review of the history of the EPA's policy regarding ash management and its interpretation of Section 3001(i) confirms that deference to the EPA's views is fully appropriate.

1. The agency has not changed its regulatory approach.

The starting point for considering the EPA's position on this issue is its 1980 regulatory exclusion for household wastes. The EPA understood that Congress, in enacting RCRA, expected the entire household waste stream would be excluded from Subtitle C regulation. *See* S. Rep. No. 94-488, 94th Cong., 2d Sess. 16 (1976). In giving effect to this expectation, the EPA stated that incinerator ash was part of the excluded waste stream. *See* 45 Fed. Reg. 33,099 (May 19, 1980).

Like many others, the EPA was perplexed by the "clarification" of the exclusion that Congress enacted in the 1984 Amendments. In its preamble to a regulation that mirrored the language of section 3001(i), the EPA noted that the statute was silent as to the status of residues from burning combined household and non-household, non-hazardous waste. EPA said it did not see in the statute an intent to exempt ash that routinely exhibited a characteristic of hazardous waste. EPA also said, however, that it did not know whether this would be an issue:

> EPA has no evidence to indicate that these ash residues are hazardous under existing rules. . . . Given the highly beneficial nature of resource recovery facilities, any future additional regulation of their residues would have to await consideration of the important technical and policy issues that would be posed in the event serious questions arise about the residues.

50 Fed. Reg. 28, 725-26 (July 15, 1985).

By 1987 the EPA was openly expressing doubt about its reading of congressional intent. Testifying before the Senate Subcommittee on Hazardous Waste and Toxic Substances of the Committee on Environment and Public Works, the EPA official responsible for implementing RCRA stated:

> The Agency has reexamined that interpretation and now concludes that it may have been in error. The Agency believes that the language and legislative history of Section 3001(i) were probably intended to exclude these ash residues from regulation under Subtitle C.
>
> It seems clear that Congress' interest in Section 3001(i) was to encourage energy recovery. Under the section, the reach of the household exclusion was to be extended for facilities that recover energy. The Agency's prior interpretation of the section would restrict the exclusion with respect to ash residue for facilities that recover energy as well as those that do not. This appears inconsistent with the reach of the household

> exclusion itself (which clearly covers ash). It also appears inconsistent with the expressed legislative intent . . . .

December 3, 1987, testimony of J. Winston Porter at 16-17.

By 1989 the EPA had resolved the safety concerns that supported early caution. Testifying in support of a bill that would have resolved the ambiguity in Section 3001(i) by explicitly authorizing regulation of incinerator ash under Subtitle D rather than Subtitle C, EPA's Director of the Office of Solid Waste concluded that "a special waste program under Subtitle D, tailored to ash, could be consistent, practical, and environmentally safe." *Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 101st Cong., 1st Sess. 44 (May 11, 1989) (testimony of Sylvia Lowrance). *See also id.* at 33.[13]

The EPA's 1992 Memorandum, which officially superseded its 1985 document regarding Section 3001(i), is consistent with both the views expressed by Mr. Porter five years earlier regarding congressional intent and Ms. Lowrance's 1989 judgment concerning safety. Following a detailed analysis of the statute and its legislative history, the EPA observed that "the two statutory goals embodied in section 3001(i)--protecting the environment and promoting resource recovery from non hazardous solid waste--are best

[13] Neither the introduction of subsequent legislation nor its fate is relevant to the interpretation of congressional intent in 1984. *See United States v. United Mine Workers of America*, 330 U.S. 258, 282 (1947); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980); *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

served by exempting MWC [municipal waste combustion] ash from hazardous waste regulation." EPA's 1992 Memorandum at 5. With regard to the former, "EPA has determined that MWC ash can be regulated in a manner that will be protective of human health and the environment under Subtitle D." *Id.* With respect to the latter, the EPA stated:

> If section 3001(i) were interpreted as not exempting MWC ash derived from the incineration of combined household waste and nonhazardous commercial and industrial waste from regulation as hazardous waste, the policy goal stated in the Senate Report [of encouraging commercially viable resource recovery facilities] could be substantially frustrated.

Id. at 4.

The EPA has consistently declined to extend Subtitle C regulation to the ash residues of municipal solid waste incineration. There is no warrant for this Court to do what the agency has deemed unnecessary and inappropriate.

2. The EPA's 1992 Memorandum reflects the agency's considered judgment.

Even if the court of appeals' characterization of the EPA position as "waffling" had merit, that would not justify disregarding the agency's current interpretation. As this Court observed in *Chevron*:

> An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must

> consider varying interpretations and the wisdom of its policy on a continuing basis.

467 U.S. at 863-64. In this case, as in *Chevron*, the agency has "considered the matter in a detailed and reasoned fashion." *Id.* at 865 (footnote omitted). Its interpretation, informed by experience and reflection, is eminently reasonable. Such an interpretation deserves respect.

The form in which this interpretation appeared--a policy memorandum--is no less deserving of deference than a formal regulation. *See Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986); *EEOC v. Commercial Office Products*, 486 U.S. 107, 115 (1988). The EPA frequently relies upon memoranda to set forth its understanding of important regulatory issues. Moreover, the EPA was interpreting an existing regulation: its original household waste exclusion, supplemented by the language of Section 3001(i). *See* 40 C.F.R. § 261.4(b)(1) (1992).[14] Construing this exclusion to cover ash did not require a new regulation in 1992 any more than in 1980, when the EPA first promulgated the exclusion. Then and now, the exclusion covers a specific waste stream, including final disposal of treatment residues. *See* 45 Fed. Reg. 33,099 (May 19, 1980); EPA's 1992 Memorandum, at 2, 4.

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[14] This Court has frequently held that an agency's interpretation of its own regulations should be given controlling weight unless that interpretation is plainly erroneous, inconsistent with the regulations, or violative of the Constitution or federal statute. *E.g., Stinson v. United States*, 113 S. Ct. 1913, 1919 (1993). The EPA's express understanding, both in 1980 and in 1992, that its household waste exclusion encompasses ash residues must be upheld under this standard.

C. This Court Should Not Overturn State and Local Solid Waste Management Programs Implemented in Reliance on the Exclusion of Ash from Subtitle C Regulation.

In interpreting Section 3001(i), the Court should consider the impact of its decision on the many public and private entities that have made long-term decisions under the statute and its precursor regulation over the past thirteen years. *Amici* urge the Court not to undercut actions that state and local governments have taken in the reasonable belief that ash from resource recovery facilities is excluded from regulation under Subtitle C.

RCRA envisions that local governments will assume front-line responsibility for solid waste planning and management. Congress mandated minimum federal standards for waste disposal facilities but encouraged cities and counties to select facilities best suited to the local climate, geology, economy and demography. To facilitate local control over solid waste management, Congress provided technical and financial assistance to local governments. 42 U.S.C. §§ 6901(a)(4), 6941.

Through RCRA, Congress expressly invited local governments to plan and implement resource recovery. 42 U.S.C. § 6941 ("The objectives of [Subtitle D] are to assist in developing and encouraging methods for the disposal of solid waste . . . which maximize the utilization of valuable resources including energy and materials which are recoverable from solid waste . . ."). *See* 42 U.S.C. §§ 6943, 6947(b) (ensuring that state solid waste plans supported local resource recovery efforts); 42 U.S.C. § 6902(a)(1) (federal assistance for planning resource recovery); 42 U.S.C. § 6942(c)(10) and (11) (state plans must consider resource recovery facilities and markets for energy recovery); 42

U.S.C. § 6943(c) (federal funds contingent upon states' support for municipalities' resource recovery efforts) .

Local governments took up resource recovery as a solid waste management option not just because of congressional urging, but also because the traditional waste management method--placing unburned waste in landfills--had failed. "In 1986, 22 percent of the sites that were listed or proposed for listing on the National Priorities List under CERCLA were municipal solid waste landfills." Jeffrey M. Gaba and Donald W. Stever, *Law of Solid Waste, Pollution Prevention and Recycling* § 4.01 (1992).[15]

As local governments opted for resource recovery in reliance upon the exclusion set forth in Section 3001(i), several states promulgated special solid waste programs for incinerator ash.[16] These programs address the peculiar characteristics of ash; they do not coincide with all of the requirements of Subtitle C's "cradle-to-grave" hazardous waste management system. All such programs would be

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15 "CERCLA" or the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq., is the federal statute requiring cleanup of sites where hazardous substances have been released to the environment. Sites are added to the National Priorities List under CERCLA only if the EPA finds that they present a significant risk to public health or the environment compared to other sites in the nation. *See* 42 U.S.C. § 9605(a)(8). These sites are commonly referred to as "Superfund sites." 49 Fed. Reg. 40,320 (Oct. 15, 1984).

16 *See, e.g.*, Mich. Comp. Laws §§ 299.432a - .432b (1991); Fla. Stat. Ann. § 403.7045 (West Supp. 1992); Fla. Admin. Code ch. 17-702 (1992); Code Me. R. ch. 403 (1990); Mass. Regs. Code title 310, §§ 19.119, .131 (1992); Conn. Agencies Regs. §§ 22a-209-1, -8, -14 (1990); N.Y. Comp. Codes R. Regs. title 6, §§ 360-2.14, -3.5 (1992); N.H. Code Admin. R. Dept. Env. Serv. Part Env. Wm 2602 (1992); 25 Pa. Code § 75.37 (1991).

rendered moot if the court of appeals' interpretation were upheld.

Amici City and County of Spokane illustrate the process by which local governments came to incorporate resource recovery into their municipal waste management strategies. For Spokane, resource recovery addressed not only a crisis of landfill capacity but also a crisis surrounding the community's drinking water. The citizens of Spokane draw their water from the Spokane Valley-Rathdrum Prairie Aquifer, which has been designated as the sole source of drinking water for over 500,000 people. 43 Fed. Reg. 5,566 (Feb. 9, 1978). This aquifer is a fragile resource, subject to pollution from landfills located above it.

These landfills have been a concern for many years. In 1979 the Spokane County Engineer's office issued its Water Quality Management Plan to Preserve the Quality of the Spokane-Rathdrum Aquifer under Section 208 of the Federal Water Pollution Control Act, 33 U.S.C. § 1288. Noting contamination, the Water Quality Management Plan recommended that resource recovery, recycling, and innovative disposal methods be considered as alternatives to landfills. In 1984 Spokane's Northside Landfill was placed on the National Priorities List ("NPL"). Spokane's landfills at Mica, Greenacres and Colbert were also added to the NPL. 51 Fed. Reg. 21,054 (June 10, 1986). The Mica, Greenacres and Colbert landfills are now closed, and all but a few acres of the Northside Landfill are closed as well.

In response to declining landfill capacity and threats to its drinking water supply, Spokane began a regional public planning process. The first step was to consider alternatives to solid waste landfills. In 1981 Spokane began analyzing resource recovery and recycling. Three years later it adopted the 1984 Spokane County Comprehensive Solid Waste

Management Plan Update ("1984 Plan"). The 1984 Plan includes specific elements for recycling, waste reduction and resource recovery; garbage landfills are only a last resort. The Washington Department of Ecology approved the 1984 Plan, and the Washington Supreme Court held that it was consistent with the Washington Solid Waste Management Act, Wash. Rev. Code ch. 70.95. *Citizens for Clean Air v. City of Spokane*, 114 Wash. 2d 20, 785 P.2d 447 (1990).

To mitigate the effects of existing landfills as rapidly as possible, Spokane aggressively implemented the recycling and resource recovery elements of the 1984 Plan. Recycling programs increased the recycling rate in Spokane County from 5% in 1984 to 31% in 1992.[17] To manage the rest of the waste stream, Spokane issued an environmental impact statement and selected a site for a waste-to-energy facility ("WTE") in 1986. In 1987 Spokane signed a vendor contract to build and operate the WTE, a power sales contract for the electricity that the WTE generates, and a lease for the WTE site. In 1989 Spokane issued $103 million in bonds and accepted a $60 million grant from Ecology to design and build the WTE and recycling programs. In 1990 Spokane signed a long-term contract for ash disposal away from Spokane's aquifer at *amicus* Regional Disposal Company's new ash monofill in Klickitat County, Washington.

If the Court were to uphold the court of appeals' decision, subjecting ash residues to Subtitle C regulation, Spokane's costs would skyrocket. Whereas the total cost of transportation and off-site disposal for ash at a new Washington State monofill is $35-40 per ton, the disposal

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[17] Spokane's long-range goal is to recycle 50% by 1995, in accordance with the goal set by the Washington Legislature. Wash. Rev. Code § 70.95.010(9) (1992). *See also* Spokane County Comprehensive Solid Waste Management Plan Update, at 82 (January 1992).

fees alone for Subtitle C landfills in the Northwest are approximately $240-270 per ton. In addition to raising disposal fees, Subtitle C would impose the costs of complying with hazardous waste generator and transporter requirements. *See* 40 C.F.R. Pts. 262, 263 (1992). The financial calamity that Subtitle C would visit on Spokane's resource recovery efforts illustrates the impact of a decision upholding the court of appeals on similar programs nationwide.

From the perspective of local governments and state regulators faced with the need to establish long-term programs during the 1980s, ash appeared to be excluded from Subtitle C regulation. In 1980 the EPA interpreted its original household waste exclusion to cover ash. Congress's subsequent enactment of the Section 3001(i) retained all relevant language from EPA's regulation and expanded its scope. The district courts that addressed the issue agreed that Section 3001(i) excluded ash from Subtitle C.[18]

Cities, counties, and the private companies that contract with them have established substantial long-term commitments formed around the EPA's original exclusion of the household waste stream from Subtitle C regulation. It is completely unnecessary to undo more than a decade of public planning and decision making. Were the court of appeals' decision to be affirmed, resource recovery would be profoundly damaged. This would be a tragic fate for a waste

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[18] *Environmental Defense Fund v. Wheelabrator Technologies*, 725 F. Supp. 758 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S. Ct. 453 (1991); *Environmental Defense Fund v. City of Chicago*, 727 F. Supp. 419 (N.D. Ill. 1989), *rev'd*, 948 F.2d 345 (7th Cir. 1991), *vacated*, 113 S. Ct. 486 (1992), *aff'd on remand*, 985 F.2d 303 (7th Cir.), *cert. granted*, 61 U.S.L.W. 3845 (1993).

management strategy that Congress has actively promoted and municipalities have adopted at great expense.

CONCLUSION

The Court should reverse the decision of the court of appeals and hold, consistent with the EPA's interpretation of Section 3001(i), that ash residues from qualifying resource recovery facilities are excluded from regulation under Subtitle C.

Respectfully submitted,

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